Supreme Court, U.S.
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No. _____ 09-401 SEP 30 2009

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In The

Supreme Court of the United States

GEOFFREY N. FIEGER,

Petitioner,

v.

SUPREME COURT OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

MICHAEL DEZSI
FIEGER, FIEGER, KENNEY,
JOHNSON & GIROUX, P.C.
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does an attorney who has been admitted to appear *pro hac vice* before a State tribunal have a constitutional right to notice and an opportunity to be heard before a State Supreme Court may revoke his *pro hac vice* status during an ongoing civil matter?

II. Does an individual have a constitutional right to retain counsel of her choice in a civil proceeding similar to the Sixth Amendment right of a criminal defendant to retain counsel of her choice?

LIST OF PARTIES

The parties are listed in the caption. By order of the South Carolina Supreme Court, the Office of Disciplinary Counsel filed pleadings in this matter but was never made a party to these disciplinary proceedings.

CORPORATE DISCLOSURE STATEMENT

None of the parties is a privately or publicly held company to which Rule 29.6 applies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Geoffrey N. Fieger respectfully petitions this Court for a writ of certiorari to review the order rendered by the South Carolina Supreme Court.

OPINIONS BELOW

The July 21, 2003, Order of the Court of Common Pleas, Eleventh Judicial Circuit, granting *Pro Hac Vice* Admission to Geoffrey N. Fieger is printed at App. 20.

The September 28, 2007, Order of the South Carolina Supreme Court granting the Office of Disciplinary Counsel's Petition for Withdrawal of Permission to Appear Pro Hac Vice is printed at App. 16.

The December 11, 2007, Order of the South Carolina Supreme Court denying Petitioner's Motion for Reconsideration and amending the Court's order of September 28, 2007, is printed at App. 12.

The August 26, 2008, Order of the South Carolina Supreme Court granting Petitioner's motion to strike Dr. Capell's return, remanding the matter to the Office of Disciplinary Counsel for consideration of Dr. Capell's response as a complaint, and holding in abeyance Petition to Remove Suspension is printed at App. 9.

The October 23, 2008, Order of the South Carolina Supreme Court denying Petitioner's Motion for Reconsideration is printed at App. 8.

The May 21, 2009, Order of the South Carolina Supreme Court denying Respondent's Motion to Reconsider Court's Order Holding in Abeyance Petition to Remove Suspension to Appear Pro Hac Vice is printed at App. 6.

The July 23, 2009, three-two decision of the South Carolina Supreme Court is printed at App. 1.

JURISDICTION

This Court's jurisdiction is properly invoked under 28 U.S.C. § 1257.

The South Carolina Supreme Court issued its Order on July 23, 2009. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law;

South Carolina Appellate Court Rule (SCACR) 404(e):

> Conduct of Attorney Appearing Pro Hac Vice. An attorney appearing pro hac vice is subject to the jurisdiction of the South Carolina courts with respect to South Carolina law governing the conduct of attorneys to the same extent as an attorney admitted to practice law in this state. The attorney shall comply with the South Carolina Rules of Professional Conduct and is subject to the disciplinary jurisdiction of the Supreme Court of South Carolina. The tribunal in which an attorney is appearing pro hac vice or the Supreme Court of South Carolina may, for violations of South Carolina law, the South Carolina Rules of Professional Conduct, or orders of the court, withdraw its permission for an attorney to appear pro hac vice.

South Carolina Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 17, Rule 413 SCACR:

> (a) Criminal Prosecution or Conviction for a Serious Crime. Without the necessity of Commission action, the Supreme Court may place a lawyer on interim suspension upon notice of the filing of an indictment, information or complaint charging the lawyer with a serious crime, and shall immediately place a lawyer on interim suspension on receipt of a

> certified copy of a judgment of conviction or other competent evidence showing that the lawyer has been convicted of a serious crime. The fact that sentencing may be delayed or an appeal may be taken shall not prevent the Supreme Court from imposing an interim suspension.

STATEMENT

In 2002, Petitioner Geoffrey Fieger, a licensed Michigan attorney, was retained by Ms. Maggie Sheikh to represent her in a lawsuit alleging medical malpractice arising from the death of her husband. *See Sheikh v. Lexington Medical Ctr.*, C.A. No. 2003-CP32-0675 (2003) (Court of Common Pleas, County of Lexington, South Carolina). Because he was from out of state, Petitioner sought *pro hac vice* status to appear in the matter which was granted on July 21, 2003.

As Plaintiff Sheikh's chosen trial counsel, Petitioner spent six weeks in 2006 trying the matter before a jury and obtained a $30 million verdict, reputably the largest in South Carolina's history. Following the verdict, the trial court granted defendants' motion for a new trial absolute.

In August 2007, while awaiting retrial in the *Sheikh* matter, Petitioner Fieger was indicted by a grand jury in the Eastern District of Michigan on allegations of campaign finance violations.

In September 2007, based on Petitioner's federal indictment, the South Carolina's Office of Disciplinary Counsel (ODC) filed a Petition for Withdrawal of Permission to Appear Pro Hac Vice based on Rule 17(a), RLDE, and Rule 413, SCACR which provides that the Supreme Court may place a lawyer on interim suspension upon notice of the filing of an indictment charging the lawyer with a serious crime. On September 28, 2007, the South Carolina Supreme Court issued its Order granting ODC's Petition for Withdrawal of Permission to Appear Pro Hac Vice. Specifically, the Court's Order provided that:

> The Petition is granted and respondent's authority to Appear Pro Hac Vice in any court or tribunal in South Carolina is hereby revoked. App. at 16.

On October 5, 2007, Petitioner filed his motion for reconsideration of the Court's Order dated September 28, 2007. In an Order dated December 11, 2007, the Court denied Petitioner's motion for reconsideration and amended its prior order of September 28, 2007. Specifically, the Court amended its Order of September 28, 2007, holding that Petitioner's authority to appear *pro hac vice* was suspended instead of the prior Order which revoked the same. App. at 14.

On June 2, 2008, a federal petit jury in Detroit acquitted Petitioner Fieger of all charges contained in the indictment. On June 25, 2008, Petitioner Fieger filed with the Clerk of the South Carolina Supreme

Court his Petition to Remove Suspension along with the Judgment of Acquittal.

Although the ODC did not oppose Mr. Fieger's Petition to Remove Suspension, on July 11, 2008, Dr. Capell, one of the defendants in the *Sheikh* case, filed her Return to Mr. Fieger's Petition to Remove Suspension opposing a lift of the suspension on Mr. Fieger's authority to appear *pro hac vice*. On July 18, 2008, Mr. Fieger filed his Petition to Strike Dr. Capell's Return to Petition to Remove Suspension. In his Petition to Strike Dr. Capell's Return, Petitioner Fieger asserted that Dr. Capell had no standing to file a Return pertaining to the suspension of his authority to appear *pro hac vice*. On July 25, 2008, Dr. Capell filed a Return to Mr. Fieger's Petition to Strike Dr. Capell's Return to Petition to Remove Suspension.

On August 26, 2008, the South Carolina Supreme Court issued its Order granting Mr. Fieger's Petition to Strike Dr. Capell's response as a formal filing. The Court also remanded the matter to the ODC for consideration of Dr. Capell's "complaint" against Mr. Fieger. At the same time, the Court held in abeyance Mr. Fieger's Petition to Remove Suspension pending resolution of Dr. Capell's complaint.

On September 8, 2008, the ODC advised Petitioner Fieger of Dr. Capell's complaint and indicated that he had fifteen days to respond to the complaint.

On September 25, 2008, Petitioner Fieger filed with the Court his motion for reconsideration of the Court's Order dated August 26, 2008, which struck

Dr. Capell's return yet remanded the matter to the ODC for consideration of Dr. Capell's return as a complaint.

On September 26, 2008, Mr. Fieger filed with the ODC his response to Dr. Capell's complaint.

On October 23, 2008, the Court issued its Order denying Mr. Fieger's Motion for Reconsideration of the Court's Order holding in abeyance his Petition to Remove Suspension. There were two dissenting justices who would have granted the request to reconsider. App. at 8.

On March 10, 2009, Mr. Fieger filed his Motion to Reconsider Court's Order Holding in Abeyance Petition to Remove Suspension to Appear Pro Hac Vice. At that time, Mr. Fieger indicated in his motion that there had been no adverse action taken by the ODC and that his clients were awaiting retrial in the *Sheikh* case which was being delayed by Petitioner Fieger's continued suspension. In his motion, Mr. Fieger asserted that the arbitrary and continued suspension of his admission *pro hac vice* without reason or justification violated his and his client's constitutional rights under the Due Process Clause of the Fourteenth Amendment.

On April 3, 2009, the ODC filed its Return to Mr. Fieger's motion indicating although the "complaint" against Petitioner was under investigation, it did not oppose lifting Petitioner's suspension.

On May 21, 2009, the Court issued an Order again denying Mr. Fieger's Motion to Reconsider Court's Order Holding in Abeyance Petition to Remove Suspension to Appear Pro Hac Vice.

On June 23, 2009, the Commission on Lawyer Conduct recommended to the ODC the dismissal of Dr. Capell's complaint against Mr. Fieger. App. 4-5. The Commission's letter indicated that "[t]his dismissal constitutes a final disposition of [the] complaint." App. at 4-5.

On July 2, 2009, in light of the ODC's dismissal of the complaint against him and in the absence of any other matters pending against him, Mr. Fieger filed his Motion to Remove Suspension to Appear *Pro Hac Vice*.

On July 23, 2009, a bare three-justice majority of the Court unilaterally issued its Order withdrawing permission for Mr. Fieger to appear *pro hac vice* in South Carolina. Having withdrawn his permission to appear, the Court denied as moot Mr. Fieger's Motion to Remove Suspension to Appear *Pro Hac Vice*. In its Order, a majority of the Court held that:

> Based on the fact that respondent provided false information on his Verified Application for Admission Pro Hac Vice in *Sheikh v. Lexington Medical Center*, 03-CP-32-0675, which he signed, under oath, on April 22, 2003, and filed with this Court and the lower

> court, and respondent's established misconduct in other jurisdictions, including threatening witnesses, excessively and disruptively arguing with a trial judge's ruling, and repeatedly submitting false information on *pro hac vice* applications, we hereby withdraw permission for respondent to appear pro hac vice in this State. Rule 404(e), SCACR. Respondent's Motion to Remove Suspension to Appear Pro Hac Vice is therefore denied as moot. App. 1-2.

Two justices dissented and would have lifted Mr. Fieger's suspension. App. 3.

The reasons set forth in the South Carolina Supreme Court Order withdrawing Petitioner's authority to appear *pro hac vice* apparently came from the unsubstantiated allegations contained in Dr. Capell's Return to Mr. Fieger's Petition to Remove Suspension which was filed with the South Carolina Supreme Court but later stricken as improperly filed.

REASONS FOR GRANTING THE PETITION

I. Contrary to the jurisprudence of this Court, the Order of the South Carolina Supreme Court withdrawing Petitioner's authority to appear *pro hac vice* without due process of law deprives Petitioner of his rights under the Fourteenth Amendment to the United States Constitution.

This case presents an important constitutional question concerning due process rights of an out-of-state attorney's authority to appear *pro hac vice* as retained counsel in a civil case. The jurisprudence of this Court, along with numerous other courts across the country, have uniformly held that, once admitted, an attorney's license to practice law cannot be revoked without due process of law.

In this case, South Carolina's Office of Disciplinary Counsel dismissed the only pending complaint filed against Petitioner Fieger. Without any pending complaint, and without any notice of its intent, the South Carolina Supreme Court *sua sponte* revoked Petitioner Fieger's authority to appear *pro hac vice* in a protracted, civil matter that was awaiting retrial.

Interestingly, four days after the South Carolina Supreme Court *sua sponte* revoked Petitioner's *pro hac vice* status, the South Carolina Supreme Court amended SCACR 404(e) by adding new grounds upon which the court could revoke *pro hac vice* status. The prior version of SCACR 404(e) provided that the court

may withdraw *pro hac vice* status only for violations of South Carolina law, the South Carolina Rules of Professional Conduct, or orders of the court.

The new rule provides that the court may withdraw *pro hac vice* status based on the reasons contained in the prior rule or "the submission of an Application for Admission Pro Hac Vice which contains false, misleading or incomplete information; the pendency of a lawyer disciplinary proceeding or the imposition of a suspension, disbarment or other lawyer disciplinary sanction in this or another jurisdiction; the withdrawal or suspension of permission to appear pro hac vice in this or another jurisdiction; or other good cause." SCACR 404(e) (amended July 27, 2009).[1]

At no time was Petitioner ever apprised of the grounds upon which the South Carolina Supreme Court revoked his authority to appear *pro hac vice.* Nor was Petitioner ever given an opportunity to confront or respond to the allegations lodged against him by the South Carolina Supreme Court in its *sua sponte* order withdrawing his *pro hac vice* status. As a result of the Court's Order, Petitioner has been deprived of his rights under the Due Process Clause of the Fourteenth Amendment, and Petitioner's

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[1] Seemingly, the South Carolina Supreme Court was prompted to amend SCACR 404(e) in an attempt to justify, after the fact, the revocation of Petitioner's *pro hac vice* status where Petitioner had committed no wrongdoing under the prior version of the rule.

client, who is awaiting retrial of her civil claims which once resulted in a $30 million judgment in her favor, has been deprived of her constitutional right to the retained counsel of her choice.

This matter thus represents a substantial question as to the due process rights afforded an attorney who has already been admitted to appear *pro hac vice* before a state tribunal. Because the South Carolina Supreme Court's decision in this matter contravenes this Court's jurisprudence under the Fourteenth Amendment, a grant of certiorari is appropriate.

As early as 1867, the Supreme Court aptly held in *Ex parte Garland*, 4 Wall. 333, 379 (1867) that:

> The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

Nearly one hundred years later, the Supreme Court reaffirmed that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 (1957); *Barry v. Barchi*, 443

U.S. 55 (1979) (Brennan, J., concurring) ("I also agree that appellee's trainer's license clothes him with a constitutionally protected interest of which he cannot be deprived without procedural due process. What was said of automobile drivers' licenses in *Bell v. Burson*, 402 U.S. 535, 539 (1971), is even more true of occupational licenses such as Barchi's").

In *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963), the Supreme Court held that "the requirements of procedural due process must be met before a State can exclude a person from practicing law." In *Willner*, the Supreme Court concluded that the petitioner bar applicant was denied due process where his application for admission to practice law was denied and he was never apprised of the reasons for the denial nor did he have an opportunity to be heard on the matter.

In reaching its conclusion, the *Willner* Court emphasized that:

> Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Willner, 373 U.S. at 105 (quoting *Morgan v. United States*, 304 U.S. 1, 18-19 (1938)). Having found that petitioner Willner was never apprised of the grounds for the denial of his application for admission, the

Supreme Court concluded that he was deprived of his rights under the Due Process Clause of the Fourteenth Amendment.

In this instance, the Orders of the South Carolina Supreme Court represent a fundamental misunderstanding of this Court's Fourteenth Amendment jurisprudence governing the due process rights of attorneys admitted to appear *pro hac vice*.

In its Order dated December 11, 2007, the South Carolina Supreme Court summarily concluded that "[t]here is no federal constitutional or statutory right to be admitted pro hac vice." The South Carolina Supreme Court cited this Court's decision in *Leis v. Flynt*, 439 U.S. 438 (1979) to support its conclusion. *Leis*, however, does not address the due process rights of an attorney *already* admitted to appear *pro hac vice*.

In *Leis*, the respondent attorneys sought but were denied admission *pro hac vice* to appear before the tribunals of Ohio. The attorneys filed an action in federal court claiming that the right of an out-of-state lawyer to appear *pro hac vice* was an interest protected by the Fourteenth Amendment. This Court disagreed and held that an out-of-state attorney had no claim of entitlement under Ohio law to appear *pro hac vice*.

In this case, Petitioner Fieger had *already* been admitted to appear *pro hac vice* before the South Carolina courts. In fact, Petitioner Fieger had already laboriously tried his client's case and obtained a

favorable judgment of $30 million. Under these circumstances, Petitioner Fieger's constitutional rights to due process attached in 2002 when he was admitted to represent and assist his client with her claims. After being admitted to appear and practice, Petitioner Fieger enjoyed all of the same rights, privileges, and due process afforded to any other duly admitted attorneys of South Carolina. This distinction is no small difference.

In *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367 (11th Cir. 1989), the Eleventh Circuit recognized, contrary to the South Carolina Supreme Court's holding in this case, that *Leis* is distinguishable in the instance of an attorney, like Petitioner Fieger, who has already been admitted to appear *pro hac vice*. Addressing this exact point, the Eleventh Circuit aptly noted that:

> *Leis* did not address, however, the procedural rights of an attorney regarding *revocation* of *pro hac vice* status once it has been granted. *Leis* did observe that a property interest must be based on some legal rule or "mutually explicit understanding." *See* [*Leis v. Flynt*, 439 U.S. 438, 442]. We think it clear that admission of an attorney *pro hac vice* constitutes such an understanding, and that an attorney, once admitted *pro hac vice*, enjoys the basic procedural rights enunciated in *Kleiner* [*v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985)].

In *Kirkland*, the Eleventh Circuit ultimately vacated the lower court's revocation of the attorney's *pro hac vice* status in the midst of an on-going civil case because the attorney lacked notice of the reasons underlying the revocation of his *pro hac vice* status.

In this case, the South Carolina Supreme Court fundamentally misconstrued this Court's decision in *Leis* and concluded that because an attorney has no constitutional right to be admitted *pro hac vice*, he has no rights under the Due Process Clause arising from the revocation of his *pro hac vice* status *after* he is already admitted to appear.

Having misconstrued *Leis*, the South Carolina Supreme Court never apprised Petitioner Fieger of its reasons to revoke his *pro hac vice* status nor provided him with an opportunity to be heard in the matter. The South Carolina Supreme Court's decision to *sua sponte* revoke Petitioner's *pro hac vice* status came midway through a civil case in which Petitioner's client was awaiting retrial after Petitioner had already obtained a $30 million judgment in the case.

By revoking his *pro hac vice* status under these circumstances, the South Carolina Supreme Court's order effectively halts the civil proceedings that have already been underway for years, and in which Petitioner's client is awaiting retrial but has now been deprived of her retained counsel of choice.

In the context of revocation of *pro hac vice* proceedings, courts across the country have consistently held that an attorney's constitutional right to

practice law, as conferred under the Fourteenth Amendment, cannot be arbitrarily denied, revoked or withdrawn without first affording her due process of law.

In *Gilbert v. Trueblood*, 629 F.2d 302 (3d Cir. 1980), the Third Circuit vacated an order of revocation of *pro hac vice* admission holding that the attorney was entitled to notice of the impending action and to be informed of the basis of the action. "In short, the attorney should be notified of two things: the conduct of the attorney that is the subject of the inquiry, and the specific reason this conduct may justify revocation." *Id.* at 304.

The Ninth Circuit has also emphasized that "[b]efore denying an attorney admission to the bar of the District Court on the basis of character, due process requires that the District Court give the applicant notice, the reasons for its action, and an opportunity to respond." *Gallo v. United States District Court for the District of Arizona*, 349 F.3d 1169 (9th Cir. 2003) (citing *In re Ruffalo*, 390 U.S. 544, 550 (1968)).

The Fifth Circuit has similarly concluded that broad, vague allegations of attorney misconduct cannot serve as the basis to deny or revoke an attorney's admission to appear *pro hac vice*. In the case of *In re Evans*, 524 F.2d 1004, 1008 (5th Cir. 1975), the Fifth Circuit emphasized that:

> If a District Court has evidence of behavior that it believes justifies denying an attorney

> admission *pro hac vice*, it must set a hearing date and give the attorney adequate notice of all incidents of alleged misbehavior or unethical behavior that will be charged against him. Specific allegations must be made; general accusations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with adequate opportunity to defend himself and his professional reputation. The presiding judge must be sensitive to possible conflicts of interest if events cast him into the roles of witness, prosecutor, and judge.

Having found that the district court denied attorney Evans' admission *pro hac vice* based on the "barest form of discretion," the Fifth Circuit granted mandamus relief and compelled the lower court to grant Evans' application to appear *pro hac vice*.

The Second Circuit has also recognized the distinction between denial and revocation of *pro hac vice* applications and held that revocation requires a tribunal to afford due process including notice of the grounds supporting revocation and an opportunity to be heard on the charges. In *Martens v. Thomann*, 273 F.3d 159 (2d Cir. 2001), the Second Circuit considered whether a lower court denied due process by revoking attorneys' *pro hac vice* status without notice or an opportunity to respond to the charges.

In vacating the lower court's orders of revocation, Judge Sotomayor (now Justice) wrote that "due process

requires that courts provide notice and an opportunity to be heard before imposing any kind of sanctions." *Martens*, 273 F.3d at 175 (quoting *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. 1999)). Because the aggrieved attorney "first learned of the revocation of his *pro hac vice* status in the very order that effected it[,]" the Court concluded that he was denied due process. *Id.* at 176. So it is here.

In this matter, the South Carolina Supreme Court *never* apprised Petitioner of its intent to revoke his *pro hac vice* status. Indeed, Petitioner Fieger, like the attorney in *Martens*, first learned of the revocation in the very order that affected it. There was no pending complaint, and in fact the ODC had dismissed the only pending complaint against Petitioner such that Petitioner had no idea that the South Carolina Supreme Court was even considering revocation of his *pro hac vice* status. The actions taken by the South Carolina Supreme Court are in striking contrast to the holdings of courts across the country that due process must be afforded prior to the revocation of *pro hac vice* status. For this reason, certiorari should be granted in order to maintain consistency among the courts.

II. The withdrawal of Petitioner's authority to appear *pro hac vice* without due process violates Petitioner's client's constitutional right to retain counsel of her choice.

Certiorari is also appropriate in this case where Petitioner's client has been denied her constitutional right to retain counsel of her choice in violation of the Due Process Clause. In 2002, Ms. Sheikh retained Petitioner to represent her in her medical negligence claims arising from the death of her husband. After several years of litigation, a favorable jury verdict of $30 million, and the granting of a new trial absolute, Ms. Sheikh now faces a new trial without her retained counsel of choice in this matter. Contrary to this Court's jurisprudence, the South Carolina Supreme Court's has created an unconstitutional conundrum for Ms. Sheikh by depriving her of her retained counsel of choice midway through these proceedings and without due process of law.

As early as 1932, this Supreme Court held in the case of the Scottsboro Boys that "[i]f in any case, ***civil*** or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 45 (1932) (emphasis added).

Relying on *Powell*, this Court recently concluded that a criminal defendant's right to counsel of his

choice was violated by a trial court's refusal to admit *pro hac vice* the defendant's retained counsel of choice. *United States v. Gonzales-Lopez*, 548 U.S. 140 (2006). After refusing to admit *pro hac vice* defendant's retained out-of-state counsel, defendant was found guilty of a drug offense. The Eighth Circuit reversed the conviction holding that defendant was denied his right to counsel of his choice under the Sixth Amendment. *United States v. Gonzales-Lopez*, 399 F.3d 924 (8th Cir. 2005). The government appealed and this Court granted certiorari.

In affirming the decision of the Eighth Circuit, Justice Scalia characterized the refusal of allowing defendant the counsel of his choice as a structural error. "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Gonzales-Lopez*, 548 U.S. at 150. Based on these factors, the Court held that the denial of defendant's right to counsel of his choice could not be subjected to harmless error analysis. Accordingly, the Court affirmed the Eighth Circuit's reversal of defendant's criminal conviction. The same rationale applies here.

Petitioner was retained by Ms. Sheikh to represent her in a civil suit. Petitioner was duly admitted *pro hac vice* to appear in the case and successfully obtained a verdict on behalf of his client for $30 million. After the trial court ordered a new trial absolute, the South

Carolina Supreme Court *sua sponte* revoked Petitioner's *pro hac vice* status without notice, without an opportunity to be heard, and without any pending complaint.

Now, Ms. Sheikh faces the prospect of a second trial but without her counsel of choice who has already successfully tried to verdict the matter in her favor. By arbitrarily revoking Petitioner's *pro hac vice* status at this juncture of the proceedings, the South Carolina Supreme Court has denied without due process Ms. Sheikh her concomitant constitutional right to retain counsel of her choice.

The actions taken by the South Carolina Supreme Court stray far from the protections of the Due Process Clause. The South Carolina Supreme Court's *sua sponte* revocation of Petitioner Fieger's *pro hac vice* status is inconsistent with this Court's jurisprudence, and conflicts with virtually every court across the country that has considered the matter.

In short, this case presents an important and recurring issue among the courts across the country; that is, whether an attorney who is already admitted to appear *pro hac vice* is entitled to due process before a court may withdraw or revoke his authority to appear. Because the actions of the South Carolina Supreme Court are inconsistent with this Court's case law and the decisions of multiple federal circuit courts, review by this Court is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for writ of certiorari. Alternatively, the Court should summarily vacate the decision of the South Carolina Supreme Court withdrawing Petitioner's *pro hac vice* status.

Respectfully submitted,

MICHAEL DEZSI
FIEGER, FIEGER, KENNEY,
JOHNSON & GIROUX, P.C.
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555

Counsel for Petitioner

The Supreme Court of South Carolina

In the Matter of Geoffrey N. Figer, Respondent.

ORDER

On September 28, 2007, this Court granted a Petition for Withdrawal of Permission to Appear Pro Hac Vice filed by the Office of Disciplinary Counsel. The order revoked respondent's authority to appear pro hac vice in any court or tribunal in South Carolina. Thereafter, respondent filed a Motion for Reconsideration. By order dated December 11, 2007, the motion was denied and our order of September 28, 2007, was amended to state that respondent's authority to appear pro hac vice in any court or tribunal in South Carolina was suspended until further order.

In June 2008, respondent filed a Petition to Remove Suspension. By order dated August 26, 2008, the petition was held in abeyance. On September 25, 2008, respondent filed a Motion for Reconsideration. The motion was denied.

In March 2009, respondent filed a Motion to Reconsider Order Holding in Abeyance Petition to Remove Suspension to Appear Pro Hac Vice. The motion was denied by order dated May 21, 2009.

Respondent has now filed a Motion to Remove Suspension to Appear Pro Hac Vice. Based on the fact

that respondent provided false information on his Verified Application for Admission Pro Hac Vice in *Sheikh v. Lexington Medical Center,* 03-CP-32-0675, which he signed, under oath, on April 22, 2003, and filed with this Court and the lower court, and respondent's established misconduct in other jurisdictions, including threatening witnesses, excessively and disruptively arguing with a trial judge's ruling, and repeatedly submitting false information on pro hac vice applications,[1] we hereby withdraw permission for respondent to appear pro hac vice in this State. Rule 404(e), SCACR. Respondent's Motion to Remove Suspension to Appear Pro Hac Vice is therefore denied as moot.

IT IS SO ORDERED.

/s/ Jean H. Toal C. J.

/s/ John H. Waller Jr. J.

/s/ John W. Kittredge J.

---

[1] *See Reaves v. Metrohealth Medical Center,* Case No. CV-04-525855 (June 11, 2004); *Newsome v. Mt. Carmel Health Sys.,* 2005 WL 3528857 (2005); *Wills v. Dillards, Inc.,* Case No. CV-03-499877 (January 30, 2005); *In the Matter of Fieger,* Supreme Court of Arizona Order dated March 22, 2007, *supra*; *In re Fieger,* 887 N.E.2d 87 (Ind. 2008); *Florida Bar v. Fieger,* Florida Supreme Court Order dated June 12, 2008.

We would lift the suspension and not withdraw permission for respondent to appear pro hac vice.

/s/ Costa M. Pleicones J.

/s/ Donald W. Beatty J.

Columbia, South Carolina

July 23, 2009

[SEAL]

The Supreme Court of South Carolina
COMMISSION ON LAWYER CONDUCT

Deborah S. McKeown
Commission Counsel

1015 Sumter Street, Suite 305
Columbia, South Carolina 29201
Telephone: (803) 734-2037

June 23, 2009

PERSONAL AND CONFIDENTIAL

Stephen Lynwood Brown, Esquire
P.O. Box 993
Charleston, SC 29402

RE: Lawyer: Geoffrey N. Fieger, Esquire
Matter Number: 08-DE-L-1142
NOTICE OF FINAL DISPOSITION

Dear Mr. Brown:

You previously filed a complaint with the Commission on Lawyer Conduct about Geoffrey N. Fieger, Esquire in connection with the above-referenced matter. The Commission instructed the Office of Disciplinary Counsel to conduct an investigation into your allegations.

On June 19, 2009, an investigative panel of the Commission convened to consider the recommendation of Disciplinary Counsel for disposition of this matter based on the information gathered in the preliminary investigation. As required by the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, this panel was comprised of seven members, one of

whom was the chair or vice-chair of the Commission and one of whom was a lay member who has never been a lawyer.

In accordance with these rules, the inquiries of the panel were limited to whether or not there was evidence of ethical misconduct on the part of Mr. Fieger that would warrant further investigation or the filing of formal charges. After considering the report of Disciplinary Counsel setting forth the results of the investigation, the panel voted to dismiss your complaint.

At the direction of the Commission, I am notifying you of the action taken by the Commission on this matter. This dismissal constitutes a final disposition of your complaint. As required by the rules, Mr. Fieger is being notified of the action taken by the investigative panel by copy of this letter.

Sincerely,

/s/ Barbara W. Hinson
Barbara W. Hinson
Administrative Assistant

Bwh

cc: Geoffrey N. Fieger, Esquire
The Honorable Daniel E. Shearouse, Clerk
The Supreme Court of South Carolina

Lesley M. Coggiola, Esquire
Disciplinary Counsel

[SEAL]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

(803) 734-1080

FAX (803) 734-1499

May 21, 2009

Kenneth M Suggs, Esquire
Janet Jenner & Suggs, LLC
500 Taylor St.
Columbia, SC 29201

RE: Matter of Geoffrey N. Fieger

Dear Mr. Suggs:

The Court has issued the following order on your Petition in the above entitled matter:

> "Respondent's Motion to Reconsider Court's Order Holding in Abeyance Petition to Remove Suspension to Appear Pro Hac Vice is denied.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

I would grant.

s/ Costa M. Pleicones J.

May 21, 2009

Very truly yours,

/s/ Daniel E. Shearouse

DES/bcs

cc: Lesley M. Coggiola, Disciplinary Counsel

The Supreme Court of South Carolina

In the Matter of Geoffrey N. Figer, Petitioner.

ORDER

By way of order dated August 26, 2008, this Court held in abeyance petitioner's request to remove the suspension of his admission pro have vice, pending resolution of the matter by the Office of Disciplinary Counsel. Petitioner has now filed a motion for reconsideration. The motion is denied.

IT IS SO ORDERED.

/s/ Jean H. Toal C. J.

/s/ John H. Waller Jr. J.

/s/ John W. Kittredge J.

We would grant the request to reconsider.

/s/ Costa M. Pleicones J.

/s/ Donald W. Beatty J.

Columbia, South Carolina

October 23, 2008

The Supreme Court of South Carolina

In the Matter of Geoffrey N. Figer, Petitioner.

ORDER

Petitioner, an attorney admitted to practice law in Michigan, Florida, and Arizona, filed a Verified Application for Admission Pro Hac Vice, which the trial judge granted.[1]

The Office of Disciplinary Counsel (ODC) filed a Petition for Withdrawal of Permission to Appear Pro Hac Vice. The basis of the petition was petitioner's August 22, 2007 indictment on charges of conspiracy, illegal contributions, false statements, obstruction of justice, and causing an offense, all in violation of various provisions of the United States Code. This Court issued an order granting the Petition for Withdrawal of Permission to Appear Pro Hac Vice, and pursuant to Rule 17(a), RLDE, and Rule 413, SCACR, suspending petitioner's authority to appear pro hac vice in any court or tribunal in South Carolina until further order.

Petitioner has now filed a Petition to Remove Suspension based on his acquittal on all charges in the indictment. He alleges the sole reason for his

---

[1] *See Sheikh v. Lexington Med. Ctr.*, 03-CP-32-0675.

suspension has been resolved, and therefore, the order suspending him should be reversed.

ODC has submitted a letter in response taking no position on the petition and deferring to the Court's discretion.

Dr. Gail B. Capell, a defendant in *Sheik,* has filed a return, arguing petitioner should not be permitted to appear pro hac vice in any matter in South Carolina. Capell claims petitioner failed to disclose prior disciplinary proceedings in his application for admission pro hac vice and failed to supplement his application to reflect proceedings since his application.

In response to Capell's return, petitioner has filed a petition to strike. Petitioner notes Capell's return was filed without leave of this Court and argues Capell lacks standing to be heard in this proceeding.

Capell has filed a return to the petition to strike, arguing any impacted party may bring violations of the Rules of Professional Conduct to the Court's attention. Capell further contends it would not violate due process to deny the Petition to Remove Interim Suspension based on the concerns she raises.

Petitioner's request to strike Capell's response as a formal filing in this matter is granted. Rules 16(c), 18, RLDE; Rule 224(e), SCACR. However, we remand this matter to ODC for consideration of Capell's response as a complaint. The Petition to Remove

Suspension shall be held in abeyance pending final resolution of the complaint.

IT IS SO ORDERED.

/s/ Jean H. Toal C. J.

/s/ John H. Waller Jr. J.

/s/ Costa M. Pleicones J.

/s/ Donald W. Beatty J.

/s/ John W. Kittredge J.

Columbia, South Carolina

August 26, 2008

The Supreme Court of South Carolina

In the Matter of Geoffrey N. Fieger, Petitioner.

ORDER

Petitioner, an attorney admitted to practice law in Michigan, Florida, and Arizona, filed Verified Applications for Admission Pro Hac Vice in this state on three separate occasions between August 2003 and August 2007. *See* Rule 404, SCACR. The trial judge granted petitioner's Motion for Admission Pro Hac Vice in two of the matters.[1] In the third matter, the trial judge issued an order in which he stated this Court had denied Petitioner's application for admission pro hac vice.[2]

In late September 2007, the Office of Disciplinary Counsel (ODC) filed a Petition for Withdrawal of Permission to Appear Pro Hac Vice. The basis for the petition was petitioner's August 22, 2007, indictment on charges of conspiracy, illegal contributions, false statements, obstruction of justice, and causing an offense, all in violation of various provisions of the United States Code. By order dated September 28,

---

[1] *See Sheikh v. Lexington Medical Center*, 03-CP-32-0675, and *Montuori v. Palmetto Health Alliance*, 04-CP-40-3771.

[2] *See Gardner v. Kershaw County Medical Center*, 06-CP-28-900.

2007, the Court revoked Petitioner Geoffrey N. Fieger's authority to appear pro hac vice in any court or tribunal in this state.

Petitioner has filed a Motion for Reconsideration. He argues that the Court's order violates the Fourteenth Amendment to the United States Constitution. ODC has filed a return in which it argues the Court had authority to withdraw petitioner's pro hac vice admission.

There is no federal constitutional or statutory right to be admitted pro hac vice. *See Leis v. Flynt*, 439 U.S. 438 (1979). No provision of state law entitles an out of state lawyer to be admitted pro hac vice in South Carolina. Accordingly, issuance of the Court's September 28, 2007 order did not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

In any event, petitioner was served with the Petition for Withdrawal of Permission to Appear Pro Hac Vice and he has submitted the current motion. Accordingly, petitioner has been provided with notice and an opportunity to respond to the Court's order.

Further, a lawyer who is admitted pro hac vice in this State is subject to the disciplinary jurisdiction of this Court. *See* Rule 404(e), SCACR; Rule 2(q), RLDE, Rule 413, SCACR. The Court may place a lawyer on interim suspension "upon notice of the filing of an indictment, information or complaint charging the lawyer with a serious crime. . . ." *See* Rule 17(a), RLDE. "Serious crime" is defined as:

> any felony or lesser crime that reflects adversely on the lawyer's honesty, truthworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

Rule 2(aa), RLDE.

We find that petitioner was indicted for serious crimes as defined in the RLDE as the charges clearly reflect on his honesty and fitness as a lawyer. Accordingly, the Court properly withdrew petitioner's authority to appear pro hac vice before any court or tribunal in this state.

Therefore, the Motion for Reconsideration is denied. However, the order of September 28, 2007, is amended to state as follows:

> The Petition for Withdrawal of Permission to Appear Pro Hac Vice is granted and Geoffrey N. Fieger's authority to appear pro hac vice in any court or tribunal in South Carolina is hereby suspended until further order.
>
> IT IS SO ORDERED.
>
> /s/ Jean H. Toal C. J.

/s/ James S. Moore J.

/s/ John H. Waller Jr. J.

/s/ Costa M. Pleicones J.

/s/ Donald W. Beatty J.

Columbia, South Carolina
December 11, 2007

[SEAL]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
(803) 734-1080
FAX (803) 734-1499

September 28, 2007

Lesley M. Coggiola, Esquire
Disciplinary Counsel
Office of Disciplinary Counsel
PO Box 12159
Columbia, SC 29211

RE: In the Matter of Geoffrey N. Fieger, Respondent.

Dear Disciplinary Counsel:

The following order has been endorsed on your Petition for Withdrawal of Permission to Appear Pro Hac Vice regarding the above named respondent:

> "The Petition is granted and respondent's authority to Appear Pro Hac Vice in any court or tribunal in South Carolina is hereby revoked.
>
> /s/ Jean H. Toal C. J.
> For the Court

By: s/ Daniel E. Shearouse
Clerk
At the Direction of
the Chief Justice

September 28, 2007"

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

cc: Geoffrey N. Fieger, Esquire
Kenneth M. Suggs, Esquire
John Hamilton Smith, Esquire

FORM 4

(Filed Sep. 18, 2006)

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

Margaret Sheikh as Pers. Rep etc

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 2003-CP-32-0675

Lexington Medical Center, et al

DEFENDANT(S)

CHECK ONE:

[✓] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED** (*CHECK REASON*): [ ] Rule 12(b), SCRCP; [ ] Rule

41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ] Other _____.

[ ] **ACTION STRICKEN.** (*CHECK REASON*): [ ] Rule 40(j) SCRCP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

IT IS ORDERED AND ADJUDGED: [ ] See attached order; [ ] Statement of Judgment by the Court:

Verdict was rendered 8-11-06

Dated at Lexington, South Carolina, this 18 day of Sept, 2006

/s/ [Illegible]
PRESIDING JUDGE

This judgment was entered on the 18 day of Sept, 2006, and a copy mailed first class this 27 day of Sept, 2006 to attorneys of record or to parties (when appearing pro se) as follows:

/s/ Gerald Jowers	/s/ Weldon Johnson
/s/ ✓Geoffrey Fieger	/s/ George Beyhley
/s/ Rebecca Walsh	/s/ Jean Hamilton Smith
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON MARGARET SHEIKH, as Personal Representative of the Estate of ASIF SHEIKH, deceased, for the benefit of Margaret Sheikh wife, 4 children, Plaintiff, v. LEXINGTON MEDICAL CENTER, MIDLAND ASSOCIATES, INC., THOMAS GROSS, M.D., and GAIL B. CAPELL, M.D., Defendants.	IN THE COURT OF COMMON PLEAS IN THE ELEVENTH JUDICIAL CIRCUIT Civil Action No.: 2003-CP32-0675 **ORDER GRANTING *PRO HAC VICE* ADMISSION TO GEOFFREY N. FIEGER** (Filed Jul. 23, 2003)

This matter came before the Court upon the Motion of Kenneth M. Suggs, of Suggs & Kelly, Lawyers, P.A., attorneys for the Plaintiff, to admit Geoffrey N. Fieger of Fieger, Fieger, Kenney & Johnson, *pro hac vice*, to appear in this cause as counsel on behalf of the Plaintiff. This motion is made pursuant to Rule 404 of the Carolina Rules of Appellate Procedure. Having considered the motion and the affidavit submitted in support thereof, it is hereby

ORDERED, ADJUDGED AND DECREED that said motion is granted.

/s/ Marc H. Westbrook
Judge, Eleventh
Judicial Circuit

Lexington, South Carolina

July 21, 2003

No. 09-401

NOV 4 - 2009

In The
Supreme Court of the United States

GEOFFREY N. FIEGER,

Petitioner,

v.

SUPREME COURT OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Elizabeth Van Doren Gray
Tina Cundari
Counsel of Record
SOWELL GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400

Counsel for Respondent *Dated: November 4, 2009*

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroup.com

QUESTION PRESENTED

Should this Court deny the petition for writ of certiorari when the questions presented in the petition were not raised in the South Carolina Supreme Court, and the South Carolina Supreme Court did not decide an important federal question when it withdrew permission for Petitioner to appear *pro hac vice* on the basis that Petitioner provided false information on his verified application and committed misconduct in other jurisdictions?

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JURISDICTION

The petition for writ of certiorari should be denied for lack of jurisdiction because Petitioner did not raise the federal questions presented in the petition in the South Carolina Supreme Court. *See* 28 U.S.C. § 1257(a) (2006) (permitting review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right . . . is *specially set up or claimed under the Constitution* or the treaties or statutes of . . . the United States") (emphasis added); *Howell v. Mississippi*, 543 U.S. 440, 455–56 (2005) (recognizing the long line of cases holding that the failure to present a federal claim in state court is jurisdictional but declining to decide whether such a failure is jurisdictional or prudential).

The South Carolina Supreme Court does not contest the timeliness of the petition for writ of certiorari seeking review of the order dated July 23, 2009. In the event that the petition seeks review of prior orders of the South Carolina Supreme Court, the petition is late. *See* 28 U.S.C. § 2101(c) (2006) (providing that a writ of certiorari shall be filed within ninety days after the entry of the judgment sought to be reviewed); Sup. Ct. R. 13.1 (same).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) (2006):

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Petitioner Geoffrey N. Fieger seeks review of the South Carolina Supreme Court's order dated July 23, 2009, withdrawing permission for Petitioner to appear *pro hac vice* in the courts of South Carolina. The order states in part as follows:

> Based on the fact that [Petitioner] provided false information on his Verified Application for Admission Pro Hac Vice in *Sheikh v. Lexington Medical Center*, 03-CP-32-0675, which he signed, under oath, on April 22, 2003, and filed with this Court and the lower court, and [Petitioner's] established misconduct in other jurisdictions, including threatening witnesses, excessively and disruptively arguing with a trial judge's ruling, and repeatedly submitting false information on pro hac vice applications, we hereby withdraw permission for [Petitioner] to appear pro hac vice in this State. Rule 404(e), SCACR. [Petitioner's] Motion to Remove Suspension to Appear Pro Hac Vice is therefore denied as moot.

(App. 1–3.)

Petitioner did not seek rehearing of this decision, nor did he request a hearing in the motion giving rise to the decision.

Petitioner is an attorney licensed to practice law in Michigan. He was granted permission to appear *pro hac vice* in a medical malpractice case pending in South Carolina.[1] Petitioner obtained a $30 million verdict for his client, but after the verdict, the trial judge granted a new trial absolute.

Following the verdict, but before the new trial began, the South Carolina Supreme Court initially revoked (App. 16) and later suspended (App. 14) Petitioner's permission to appear *pro hac vice* in South Carolina. The court suspended permission after notice that Petitioner had been indicted by a grand jury in the Eastern District of Michigan on charges of conspiracy, illegal contributions, false statements, obstruction of justice, and causing an

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[1] There are two orders regarding Petitioner's motion to appear *pro hac vice* in the medical malpractice case pending in South Carolina. Petitioner has included only the first order in the appendix. The first order is dated July 21, 2003, and grants Petitioner permission to appear based simply on the motion and affidavit in support. (App. 20–21.) The second order is dated April 28, 2004, and grants Petitioner permission to appear over the objection of the defendants in the trial court matter and "so long as Suggs & Kelly continue to serve as local counsel." In granting the motion, the trial court stated that it had "reservations" about doing so, but was ultimately persuaded by "(1) the defendants' acknowledgement of the high esteem that local counsel enjoys in the legal community; (2) the court's recognition of the fundamental right of a party to have an attorney of her choice; and, (3) reliance upon Rule 404(c)(9), which requires attorneys seeking admission *pro hac vice* to affirm that they will comply with statutes, law, and procedural rules of this State; be familiar with and comply with the South Carolina Rules of Professional Conduct; and submit to the jurisdiction of the courts of this State and the South Carolina disciplinary process." Again, this second order does not appear in the appendix.

offense, all in violation of various provisions of the United States Code. During the suspension period, Petitioner filed multiple motions and petitions in the South Carolina Supreme Court, all of which were accepted, considered, and ruled upon by the court.

The first motion Petitioner filed was a motion to reconsider the South Carolina Supreme Court's order dated September 28, 2007, revoking permission to practice *pro hac vice* on the basis that Petitioner had been indicted for a serious crime. Petitioner contended, among other things, that to punish him and his client, "without notice, without an opportunity to be heard and without a scintilla of evidence that [he] committed any crime or violated any rule of conduct of the court violates [the presumption of innocence], as well as due process of law." Petitioner also contended that the court's order "significantly damages fundamental constitutional protections." The motion included 270 pages of exhibits and was later supplemented with additional exhibits.

After considering the materials presented, the South Carolina Supreme Court denied the motion in an order dated December 11, 2007. (App. 12–15.) The court ruled that Petitioner did not have a federal constitutional or statutory right to be admitted *pro hac vice*, and that, in any event, Petitioner received notice of the petition for withdrawal of permission to appear *pro hac vice* and had an opportunity to respond to the petition, which he did. The court modified its order dated September 28, 2007, to suspend (rather than revoke) Petitioner's permission to appear *pro hac vice* until

further order. Petitioner did not seek rehearing or reconsideration of this decision.

After a jury in Michigan acquitted Petitioner of all charges in the indictment, Petitioner filed a petition to remove the suspension. Petitioner contended that the sole basis of the suspension was the pending indictment, and, because he had been found not-guilty on all counts, the suspension should be removed.

The petition to remove suspension was met with opposition. A defendant in the trial court matter in which Petitioner appeared *pro hac vice* requested permission to respond to the petition to remove the suspension. Petitioner filed a petition to deny the defendant's request.

Later, after the defendant filed a return, Petitioner filed a petition to strike the return. Petitioner contended that the defendant did not have standing to intervene, that disciplinary proceedings had not been commenced against him, and that even if they had, the defendant was not a party to those proceedings. He contended that "[t]here are strict procedural rules regarding disciplinary matters that preclude any disciplinary proceedings without providing the accused lawyer with notice and an opportunity to be heard." He also contended that the defendant's request to intervene was "abhorrent to due process" and violated his due process rights. The defendant filed a reply brief.

On August 26, 2008, the South Carolina Supreme Court granted Petitioner's request to strike the defendant's return. (App. 9–11.) The court construed the defendant's return as a lawyer disciplinary complaint and remanded it to the Office of Disciplinary Counsel for consideration. The court held the petition to remove suspension in abeyance pending the resolution of the complaint.

Petitioner moved for reconsideration of the court's decision holding the petition to remove suspension in abeyance pending the resolution of the complaint. Petitioner contended that the allegations in the complaint, "many of which were brought forth in an earlier objection to [his] pro hac vice admission, unfairly create due process concerns for Petitioner as well as [his client]." The South Carolina Supreme Court denied the motion in an order dated October 23, 2008. (App. 8.)

Petitioner filed a second motion to reconsider. Petitioner argued that his continued suspension while the Office of Disciplinary Counsel considered the complaint was "arbitrary and capricious" and violated his "federally secured constitutional rights under the Due Process Clause of the Fourteenth Amendment." He also argued that the continued suspension denied his clients "their right to retained counsel." The South Carolina Supreme Court denied the motion in an order dated May 21, 2009. (App. 6–7.)

Finally, after the South Carolina Commission on Lawyer Conduct dismissed the lawyer disciplinary complaint under investigation by the Office of Disciplinary Counsel, Petitioner filed a motion to remove the suspension. The sole argument presented in the motion was that the suspension should be lifted because the complaint had been dismissed. Petitioner did not make any constitutional due process arguments on behalf of himself or his client, nor did he request a hearing.

It was after this seventh and final motion was filed that the South Carolina Supreme Court withdrew permission for Petitioner to appear *pro hac vice* in the courts of South Carolina. In an order dated July 23, 2009, the court found that Petitioner provided false information on his verified application and committed misconduct in other jurisdictions, thereby rendering the motion to remove suspension moot. (App. 1–3.)

Petitioner did not seek rehearing or request an opportunity to refute the court's findings. Petitioner did not argue that the withdrawal of permission to appear *pro hac vice* violated his or his client's constitutional rights. Instead, Petitioner filed a petition for writ of certiorari in this Court.

ARGUMENT

This Court should deny the petition for writ of certiorari because the questions presented in the petition were not raised in the South Carolina Supreme Court, and the South Carolina Supreme Court did not decide an important federal question when it withdrew permission for Petitioner to appear *pro hac vice* on the basis that Petitioner provided false information on his verified application and committed misconduct in other jurisdictions.

The constitutional questions presented in the petition for writ of certiorari have never been raised in the South Carolina Supreme Court, nor has the South Carolina Supreme Court decided an important federal question. For these reasons, the petition for writ of certiorari should be denied.

A. Petitioner did not raise the questions presented here in the South Carolina Supreme Court.

The petition for writ of certiorari marks the first time that Petitioner has challenged the July 23, 2009 order revoking permission for him to appear *pro hac vice* in South Carolina. He has never before challenged the order or raised the constitutional questions that he raises here.

By failing to raise the federal questions presented here to the South Carolina Supreme Court, Petitioner has overlooked a longstanding principle in this Court, which is that "this Court has

almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [the Court has] been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)). This principle stems from 28 U.S.C. § 1257(a) (2006), which gives this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right . . . is *specially set up or claimed under the Constitution* or the treaties or statutes of . . . the United States." (Emphasis added.)

The rule requiring federal claims to be addressed or properly presented in state courts "serves an important interest of comity." *Adams*, 520 U.S. at 90. As this Court has explained, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). "Thus, the rule affords state courts 'an opportunity to consider the constitutionality of the actions of a state official, and, equally important, proposed changes' that could obviate any challenges to state action in the federal court." *Adams*, 520 U.S. at 90 (quoting *Illinois v. Gates*, 462 U.S. 213, 221–22 (1983)).

The rule also serves a practical purpose. "Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by

allowing state courts to resolve issues on state-law grounds, but also assists [this Court] in [its] deliberations by promoting the creation of an adequate factual and legal record." *Adams*, 520 U.S. at 90–91.

In the case at hand, the petition for writ of certiorari should be denied because the federal law challenges to the South Carolina Supreme Court's order withdrawing permission for Petitioner to appear *pro hac vice* were not presented in the South Carolina Supreme Court. The South Carolina Supreme Court never had the occasion to consider the questions that Petitioner has presented here.

Petitioner made one argument in the motion giving rise to the court's withdrawal of his permission to appear *pro hac vice*. Petitioner argued that the suspension should be removed because the South Carolina Commission on Lawyer Conduct voted to dismiss the lawyer disciplinary complaint pending against him. That is it.

Petitioner did not request a hearing. He did not state that he had a constitutional right to a hearing before further discipline. He did not state that his client had a constitutional right to counsel of her choice. He did not raise any federal questions in the South Carolina Supreme Court.

In addition to failing to raise federal questions before the South Carolina Supreme Court rendered its decision, Petitioner failed to raise federal questions afterwards. He did not petition for rehearing. He did not move for reconsideration. He

did not tell the court that the order violated his due process rights. He did not tell the court that the order violated his client's due process rights. He did not demand to be heard so that he could refute the court's findings.

Instead, he came directly to this Court, raising constitutional due process claims that were never presented in the South Carolina Supreme Court. In doing so, Petitioner failed to exhaust the procedural remedies available to him and failed to give the South Carolina Supreme Court the opportunity to rule on the questions presented here. *See* Rule 221, SCACR (South Carolina Appellate Court Rules) (permitting petitions for rehearing); Rule 27(f), RLDE (Rules for Lawyer Disciplinary Enforcement), Rule 413, SCACR (same). *Cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (explaining that "the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts . . . .").

Although Petitioner has made due process arguments in the past, those arguments are not the same as the ones presented here and were not decided in the order sought to be reviewed. First, Petitioner previously contended that the South Carolina Supreme Court violated due process when it revoked permission for him to appear *pro hac vice* after receiving notice that he had been indicted for a serious crime.

The South Carolina Supreme Court considered Petitioner's due process argument and

found that the state court rules permitted suspension upon notice that a lawyer has been indicted for a serious crime. *See* Rule 17(a), RLDE, Rule 413, SCACR (providing that "the Supreme Court may place a lawyer on interim suspension upon notice of the filing of an indictment, information or complaint charging the lawyer with a serious crime"). In any event, the court found that Petitioner received notice and an opportunity to be heard before the court rendered its decision. The court also modified its order to state that permission to appear *pro hac vice* had been suspended rather than revoked.

Second, Petitioner argued that his continued suspension while the lawyer disciplinary complaint was under investigation by the Office of Disciplinary Counsel violated his due process rights. This is a different argument than the one raised here. Here, Petitioner contends that he is entitled to notice and an opportunity to be heard before permission to appear *pro hac vice* is withdrawn. There, Petitioner argued that continued suspension during an investigation violated due process. Nonetheless, the South Carolina Supreme Court considered and rejected Petitioner's argument, and Petitioner did not seek review of that ruling.

Petitioner filed multiple motions and petitions in the South Carolina Supreme Court. All motions and petitions were accepted and ruled upon by the court. Petitioner routinely asked the court to reconsider its rulings, and his pleas for reconsideration were heard.

The final straw in this storied disciplinary case came when the South Carolina Supreme Court determined that Petitioner provided false information on his verified application for admission *pro hac vice*. The court's order and the basis for the decision should not have come as a surprise. Petitioner has known that his veracity has been under attack since the trial court matter, when the defendants vigorously opposed his admission *pro hac vice* before the trial began. He knew that it was under attack once again in the South Carolina Supreme Court when the defendants in the trial court matter filed a return and reply brief opposing the removal of suspension. He knew it was under attack yet again when the return and reply brief were construed as a lawyer disciplinary complaint and sent to the Office of Disciplinary Counsel for investigation.

Even if Petitioner was surprised by the South Carolina Supreme Court's ruling, he should have communicated that surprise to the South Carolina Supreme Court. There is no reason to conclude that the court would not have given Petitioner whatever process he requested. During the course of his suspension, the court accepted, considered, and ruled upon each and every motion and petition that Petitioner filed, ruling in his favor once (App. 10), and modifying one of its orders as he suggested (App. 14).

Indeed, the South Carolina appellate court rules contemplate process in attorney disciplinary matters. *See* Rule 9, RLDE, Rule 413, SCACR (providing that "the South Carolina Rules of Civil

Procedure apply in lawyer discipline" matters); Rule 17(d), RLDE, Rule 413, SCACR (providing that "[a] lawyer placed on interim suspension . . . may apply to the Supreme Court for reconsideration of the order"); Rule 19(b)(1), RLDE, Rule 413, SCACR (providing that "[d]isciplinary counsel shall request the lawyer to file a response to the allegations in the complaint"); Rule 19(c)(5), RLDE, Rule 413, SCACR (providing that "[b]efore the investigative panel determines its disposition of the complaint, . . . the lawyer may request that the lawyer appear before disciplinary counsel to respond to questions"); Rule 19(d)(3), RLDE, Rule 413, SCACR (providing that a lawyer has a right to object to a notice of confidential admonition); Rule 22, RLDE, Rule 413, SCACR (providing that "formal charges shall give fair and adequate notice of the nature of the alleged misconduct . . . ."); Rule 26, RLDE, Rule 413, SCACR (explaining the hearing process); Rule 27, RLDE, Rule 413, SCACR (explaining the review process by the South Carolina Supreme Court, including the procedure for seeking rehearing).

Petitioner did not use the procedural remedies available to him. Instead, he avoided the process available in the South Carolina Supreme Court and came directly to this Court, seeking answers to questions that were not presented below.

Petitioner's failure to ask the South Carolina Supreme Court the questions presented here is fatal to the relief requested. *See* 28 U.S.C. § 1257(a) (requiring that federal questions be "specially set up or claimed" in the highest court of a state before they are reviewed by the United States Supreme Court);

Howell, 543 U.S. at 455–56 (recognizing the long line of cases holding that the failure to present a federal claim in state court is jurisdictional but declining to decide whether such a failure is jurisdictional or prudential).

The South Carolina Supreme Court did not have occasion to consider the questions raised here. For this reason, the petition for writ of certiorari should be denied.

B. The South Carolina Supreme Court did not decide an important federal question.

In addition to the fact that Petitioner did not raise the questions presented here in the South Carolina Supreme Court, the South Carolina Supreme Court did not decide an important federal question. The court decided only that Petitioner no longer had permission to appear *pro hac vice* in South Carolina based on the fact that he submitted false information on his verified application and committed misconduct in other jurisdictions. The order is silent on the federal questions that Petitioner attempts to raise in this Court.

"When the highest state court is silent on a federal question before [this Court, this Court] assume[s] that the issue was not properly presented . . . ." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). "[T]he aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here . . . .'"

Id. at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)).

Petitioner cannot defeat the assumption that the questions presented here were not raised in the South Carolina Supreme Court. There is no evidence that the South Carolina Supreme Court had a fair opportunity to address the federal questions sought to be presented here. Nothing in the court's order indicates that a constitutional question of any kind was decided. The order simply explains the reasons for withdrawal and refers to the court's authority to do so. *See* Rule 404(e), SCACR (amended July 27, 2009) (providing reasons that the court may withdraw permission to appear *pro hac vice*).[2]

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[2] Petitioner suggests that the South Carolina Supreme Court amended the rule "in an attempt to justify, after the fact, the revocation of Petitioner's *pro hac vice* status . . . ." (Pet. 11, n. 1.) But submitting false information on an application to appear *pro hac vice* is conduct that was prohibited under the former version of the rule. The former version of the rule stated that permission may be withdrawn for violations of South Carolina law and the South Carolina Rules of Professional Conduct. Rule 404(e), SCACR. The South Carolina Rules of Professional Conduct plainly provide that lawyers shall not knowingly make false statements. *See, e.g.*, Rule 8.1, South Carolina Rules of Professional Conduct, Rule 407, SCACR (providing that bar applicants and lawyers subject to discipline shall not "knowingly make a false statement of material fact" or "fail to disclose a fact necessary to correct a misapprehension . . . .").

The South Carolina Supreme Court's authority to admit and discipline lawyers stems from state law. *See* S.C. Const. Art. V, § 4 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."); S.C. Code Ann. § 40-5-10 (2001) (recognizing the court's inherent power to regulate the practice of law, including disciplining, suspending, and disbarring lawyers). *See also Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States . . . within their respective jurisdictions."). The court does not decide a federal question when it withdraws a lawyer's permission to appear *pro hac vice* in South Carolina.

Because the South Carolina Supreme Court has not decided an important federal question, the court's decision cannot be compared to the federal court decisions cited in the petition for writ of certiorari. In those cases, the courts either decided federal questions or reviewed the merits of the lower court's decision. Here, the state supreme court did not decide a federal question, and Petitioner does not seek review on the merits. Thus, the South Carolina Supreme Court's decision does not conflict with "the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b). Nor does the decision present an important question of federal law "that has not been, but should be, settled by this Court," or "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Further, the South Carolina Supreme Court has not misconstrued *Leis v. Flynt*, 439 U.S. 438 (1979), as Petitioner contends. (Pet. 16.) The South Carolina Supreme Court does not even mention the *Leis* case in the order sought to be reviewed. The court addressed the *Leis* case in its prior order dated December 11, 2007. The December 11, 2007 order rejected Petitioner's due process argument on the basis that Petitioner received notice and an opportunity to be heard before the decision was rendered. (App. 13.)

Because the order sought to be reviewed here does not decide an important federal question, the petition for writ of certiorari should be denied.

CONCLUSION

There are no compelling reasons to grant the petition for writ of certiorari. Petitioner is an attorney. He filed multiple motions and petitions in the South Carolina Supreme Court during the course of his suspension from practicing law *pro hac vice* in South Carolina, and each and every motion and petition was considered and ruled upon by the court. Given this history, there is no reason to conclude that Petitioner would not have been given a hearing either before or after permission to appear *pro hac vice* was withdrawn, had he requested one. He cannot fail to use the process on the one hand and then argue that process has been denied on the other hand. The petition for writ of certiorari should be denied.

Respectfully submitted,

Elizabeth Van Doren Gray
Tina Cundari
Counsel of Record
SOWELL GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400

Attorneys for Respondent